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Supreme Court of the United States

OCTOBER TERM, 1945

WARREN W. WILSON, MABEL M. WILSON,  
RICHARD L. CRAIGO AND LELIA F. CRAIGO,  
PARTNERS DOING BUSINESS AS WILSON LUM-  
BER COMPANY

*Appellants*

v.

No. 328

OTHO A. COOK, COMMISSIONER OF REVENUES  
OF THE STATE OF ARKANSAS

*Appellee*

APPEAL FROM THE SUPREME COURT OF  
THE STATE OF ARKANSAS

BRIEF FOR APPELLANTS ON  
FINAL HEARING

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## INDEX

### SUBJECT INDEX

	Page
OPINION OF COURT BELOW	1
GROUND ON WHICH JURISDICTION OF THIS COURT IS INVOKED	2
STATEMENT OF THE CASE	3
THE AGREEMENT BETWEEN THE UNITED STATES AND APPELLANTS	4
DECREE OF THE CHANCERY COURT	7
JUDGMENT OF THE SUPREME COURT OF ARKANSAS	7
ASSIGNMENT OF ERRORS	8
DESIGNATION OF POINTS UNDER RULE 13	8
ARGUMENT	10
Answers to Questions	10
Outline to Severance Tax Statute	18
Acts of Congress That Are Involved	19
The Severance Tax Act Constitutes Direct Interference with the United States	20
The Act Violates the Supremacy Clause of the Constitution	21

TABLE OF CASES CITED

	Page
<b>Alabama v. King &amp; Boozer</b> , 314 US 1	13, 14, 16, 24
<b>Arizona v. California</b> , 283 US 423	21
<b>Bennett v. Snyder</b> , 147 Ark. 206	12
<b>Benton v. Southern Engine &amp; Boiler Works</b> , 101 Ark. 493	11
<b>Checker Cab Co. of Hot Springs v. Leeper</b> , 207 Ark. 799	12
<b>City of Springfield v. U. S. (C. C. A.) Mass.</b> 99 F. (2d) 860, cert. den., 306 US 650	20
<b>C. O. &amp; G. R. Co. v. Harrison</b> , 235 US 292	21, 23
<b>Dewey v. Des Moines</b> , 173 US 193, 198	15, 17
<b>England v. Scott</b> , 205 Ark. 47	11
<b>Flourney v. Wiener</b> , 231 US 253, 259	17
<b>Gillespie v. Oklahoma</b> , 257 US 501	23
<b>Graves v. Texas Co.</b> , 298 US 393	23
<b>Helvering v. Gerhardt</b> , 304 US 405, 416	24
<b>Howard v. Gypsy Oil Co.</b> , 247 US 503	21
<b>Hunt v. U. S.</b> , 278 US 96	21
<b>Indian Motorcycle Co. v. U. S.</b> , 283 US 570	23
<b>Indian Territory Illuminating Oil Co. v. Oklahoma</b> , 240 US 522	21, 24
<b>James v. Dravo Contracting Company</b> , 302 US 134	13, 14, 16, 24
<b>Johnson v. State of Maryland</b> , 254 US 51	21
<b>Leonard v. Leonard</b> , 101 Ark. 542	11
<b>Large Oil Co. v. Howard</b> , 248 US 549	21
<b>Mason Company, Inc. v. Tax Commission of Washington</b> , 302 US 186	13, 14
<b>Mayo v. U. S.</b> , 319 US 441	21
<b>McCrite v. Hendrix College</b> , 198 Ark. 1149	11
<b>McCulloch v. Maryland</b> , 4 Wheat. 316	21
<b>Metcalf v. Mitchell</b> , 269 US 51	24
<b>Ohio v. Thomas</b> , 173 US 276	21
<b>Oklahoma v. Barnsdall Refineries</b> , 296 US 521	21, 23
<b>Osborn v. Bank of U. S.</b> , 9 Wheat. 738	21
<b>Panhandle Oil Co. v. Mississippi</b> , 277 US 218	23
<b>Simpson v. Blewitt</b> , 110 Ark. 87	12
<b>Thomas v. Spires</b> , 180 Ark. 671	12
<b>Trinity Farm Construction Co. v. Grosjean</b> , 291 US 472	23
<b>U. S. v. Allegheny County</b> , 322 US 174	20

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OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Arkansas has not yet appeared in the official reports, but a copy of it is in the record (pp. 22-31). The opinion upheld the Arkansas severance tax statute, which laid a tax on the privilege of severing timber from the national forests while title to the timber remained in the United States.

## GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The grounds on which the jurisdiction of this Court is invoked are:

1. The severance tax statute, as construed by the Supreme Court of Arkansas, constitutes a direct interference with the United States in the disposal of its property, and it is repugnant to paragraph 2 of section 3 of article 4 of the Constitution of the United States, which provides that Congress shall have the power to dispose of and make all needful regulations respecting the territory and other property belonging to the United States, and repugnant to article 6, clause 2 (supremacy clause) of the Constitution of the United States and the Acts of Congress which authorize sale of timber in the national forests.
2. The act, by its express terms, requires the severer to collect the tax from the owner of the product at the time of severance or to withhold it from the proceeds of sale of said product. The United States having been the owner of the said product at the time of severance, the tax is a direct tax on the United States.
3. The tax is a tax on the government's contract. The act requires the severer to secure a permit from the state, to make reports to the state, and to pay a tax for the privilege of severing the timber which he is required to sever under the terms of his contract with the United States, all of which constitutes a direct interference with the functions of the government.

## STATEMENT OF THE CASE

This controversy began when the state of Arkansas, under the provisions of sections 13,384-13,386 of Pope's Digest, filed its certificate with the Circuit Clerk of Garland County, Arkansas, claiming that appellants owed the state a severance tax of \$0.07 per thousand feet for 6,298,854 feet of timber that had been severed by the appellants from the national forests, plus a penalty of 25% for failure to pay the tax.

Section 13,384 and section 13,386 provide that when the tax has become delinquent, the commissioner of revenues shall certify the amount of the tax, together with penalties, to the circuit clerk of the county where the same or any part thereof accrued, and it shall be the duty of the clerk to record the certificate upon the docket of the Circuit Court for judgments and decrees as provided by sections 8440 and 8442 of Pope's Digest. Subdivision 1 of said section 13,386 provides that "any aggrieved purchaser may appeal to the Chancery Court for an injunction against the tax".

Appellants' complaint stated that the Commissioner of Revenues of the State of Arkansas had filed his certificate showing that appellants owed the state of Arkansas at the rate of seven cents per thousand feet for 6,298,854 feet of timber severed from the soil, plus a penalty of 25% amounting to a total of \$551.15; that the Clerk of the Circuit Court had issued execution on the certificate and the sheriff was about to levy on appellants' property; that the state's claim was for timber which appellants had severed from the national forests under contracts with the United States, which contracts were executed by

the appellants and the United States under authority granted by acts of Congress authorizing sale of timber in the national forests; that the action of the state of Arkansas was in violation of the act of Congress above referred to and in violation of the second paragraph of section 3, article 4 and article 6, clause 2 of the Constitution of the United States.

The complaint prayed that the execution on the said certificate be cancelled; that the certificate be cancelled and that the sheriff be enjoined from levying the said execution on appellant's property (R. 3-5).

#### THE AGREEMENT BETWEEN THE UNITED STATES AND APPELLANTS

It was stipulated by counsel for the parties that the state's claim was based on "the fact that appellants had severed timber from the United States national forests under several contracts entered into by plaintiffs and the United States Department of Agriculture". It was agreed that all of said contracts were substantially the same, and one of them was introduced as evidence applying to all of them (R. 6, 7-20).

This agreement was called, "Timber Sale Agreement". Appellants are called "The Purchasers". They agree to purchase from the area designated (about 2300 acres in this sample agreement) within the Ouachita National Forest all the dead timber standing or down and all of the live timber marked or designated for cutting by a Forest Officer merchantable as hereinafter defined for saw logs" (R. 8).

The agreement gives the price per thousand feet which was paid and states:

"Payment shall be made in advance installments of not less than one thousand dollars and not more than five thousand dollars each, as determined by the Forest Officer in charge and when called for by him.

• • • •

"Sealing.—7. Material shall be piled or skidded for sealing, measurement, or count if required by the Forest Officer in charge and in such manner as he shall direct. *The title to all timber included in this agreement shall remain in the United States until it has been paid for, and sealed, measured or counted.*"

• • • (Emphasis added).

"12. The purchaser shall cut all and only marked or designated live trees and shall remove all merchantable logs from the sale area. No timber shall be cut until paid for, nor removed from the place or places agreed upon for sealing until sealed, measured, or counted by a Forest Officer."

Paragraph 14 of the agreement requires the purchaser to pay double the current price for all undesignated timber damaged by carelessness of the purchaser, his employees, or contractors or employees of contractors and also to pay at double the current price for all such trees that may be injured by fires caused by the carelessness of the purchaser or his employees, or contractors, or by fires, the origin or spread of which he or they could have prevented. This section also provides that

"Unless extension of time is granted by the Forest Supervisor the right, title and interest to any

timber for which payment has been made under the provisions of this section shall revert to the United States without compensation unless it shall have been removed from any portion of the sale area accepted by the Forest Officer in charge within the three months next succeeding the date of such acceptance, or from the remainder of the sale area during the same number of months next succeeding the date of expiration or termination of this agreement. \* \* \*

*"In order to check the spread of tree disease and to improve the condition of the stand, the purchaser shall cut all dead and diseased trees marked or designated for cutting on the sale area whether merchantable or apparently unmerchantable. \* \* \* (Emphasis added).*

"All operations on the sale area, including the removal of sealed timber, may be suspended by the Forest Officer in charge, in writing, if the conditions and requirements contained in this agreement are disregarded, and failure to comply with any one of said conditions and requirements, if persisted in, shall be sufficient cause for the termination of this agreement. \* \* \*

"And as a further guarantee of a faithful performance of the conditions of this agreement, the purchaser delivers herewith a bond in the sum of twenty-five hundred dollars (\$2,500.00), and further agrees that all moneys paid under this agreement shall upon failure on his part to fulfill all and singular the conditions and requirements herein set forth, or made a part hereof, may be retained by the United States to be applied as far as may be to the satisfaction of his obligations assumed hereunder.".

## DECREE OF CHANCERY COURT

The Chancery Court held "that the Arkansas severance tax, if it be applied to timber severed from the national forest pursuant to agreements such as those introduced in evidence in this cause between the United States and the persons severing said timber, would be a tax on the operations of the government of the United States and a tax on the right of the United States to harvest the mature timber on its national forest; and the severance tax does not apply to the timber severed by the plaintiffs from the national forest".

The Chancery Court held that the certificate which had been filed by the Commissioner of Revenues was void and cancelled the certificate and the execution which had been issued on it (R. 21-22).

## JUDGMENT OF SUPREME COURT OF ARKANSAS

The Commissioner of Revenues appealed to the Supreme Court of Arkansas, which held that the statute as applied to the timber severed from the national forests was not invalid as a burden on the United States and that it did not interfere with the government's business (R.22-29); that the state did not have territorial jurisdiction to lay the tax on that part of the national forests where the title to the land was held by the United States as original owner; but that the state did have territorial jurisdiction to lay the tax on that part of the national forests where the title to the land had been acquired by the United States by purchase under the act of Congress of March, 1911 (USCA Title 16, Sec. 516). The Supreme Court of Arkansas reversed the decree of the Chancery Court and entered

a decree in favor of the state of Arkansas in the sum of \$276.35 for the timber which had been severed on that part of the national forests which had been acquired by purchase under the act of Congress (R. 31). (Appellants did not in the Supreme Court of Arkansas or in the Chancery Court argue that the state lacked territorial jurisdiction in any part of the area that was involved in the controversy.)

#### ASSIGNMENT OF ERRORS

1. The Supreme Court of Arkansas erred in giving judgment reversing the judgment of the Chancery Court of Garland County, Arkansas, which held to be void the severance tax statute of the state of Arkansas, which laid a tax for the privilege of *severing timber from the United States National Forests, while title to the said timber was in the United States*, which act also required the persons having contracts with the United States for severing the said timber to secure from the state of Arkansas a permit or license before beginning the execution of their said contracts with the United States.

2. The Supreme Court of Arkansas erred in holding that the said severance tax law was not repugnant to the second clause of article 6 (supremacy clause) of the Constitution of the United States, which provides that Congress shall have power to dispose of and make all needful rules regulating the territory and other property belonging to the United States.

#### DESIGNATION OF POINTS UNDER RULE 43

Appellants' designation under rule 13 of points to be relied on sets out the points with more particularity:

Appellants insist that this statute, as applied to the severing of the timber by appellants in the national forests, is repugnant to the second clause of article 6 of the Constitution of the United States (supremacy clause), and is also repugnant to clause 2, section 3, article 4 of the Constitution, which provides that Congress shall have power to dispose of and make all needful rules regulating the territory and other property belonging to the United States. Appellants insist that the statute is unconstitutional and void for the following reasons:

"A. The tax is a tax on the contract of the United States with appellants, which required appellants to sever the timber.

"B. Under the contract between appellants and the United States, appellants were instrumentalities of the United States and immune from the tax.

"C. The statute requires the appellants to pay the tax and collect it from the owner of the land at the time of severance, and subjects appellants to prosecution and fine for failure to do so; and the United States was the owner of the land at the time of the severance.

"D. The statute requires the appellants to secure a license from the state of Arkansas before executing their contract with the United States, and subjects them to a fine for failing to do so, and requires them to make monthly reports to the State of Arkansas with respect to the execution of their said contract, and subjects them to a fine for failure to do so."

## ARGUMENT

## OUTLINE

1. Answers to Questions.
2. Outline to Severance Tax Statute.
3. Acts of Congress That Are Involved.
4. The Severance Tax Act Constitutes Direct Interference with the United States.
5. The Act Violates the Supremacy Clause of the Constitution.

*Answers to Questions in the Order of the Court*

*Made on October 8*

## QUESTION 1

"Does the record affirmatively show that the validity of a state statute was drawn in question in the Supreme Court of Arkansas on the ground of its being repugnant to the Constitution or laws of the United States as required by section 237 (a) of the Judicial Code (28 U. S. C., sec. 344)?"

The Supreme Court of Arkansas, in its opinion (R. 23), gives a brief summary of the litigation showing that it was begun by the filing of the certificate by the Commissioner of Revenues, claiming that appellants owed the state the severance tax for timber severed from the national forests; that appellants had applied for injunction (authorized by section 13,386 Pope's Digest); that the state had intervened and sought to sustain the tax; that the Chancery Court denied the state's claim; that the appeal challenges the decree of the Chancery Court.

The Arkansas Supreme Court, under its well established rule, would have affirmed the decree of the Chancery Court, unless it appeared to be clearly contrary to the evidence.

*England v. Scott*, 205 Ark. 47.

*Benton v. Southern Engine & Boiler Works*, 101 Ark. 493;

*Leonard v. Leonard*, 101 Ark. 542.

The Chancery Court held that the tax, if applied to timber severed from the national forest, would be a tax on the operations of the United States and on the right of the United States to harvest the mature timber in its national forests.

The Supreme Court of Arkansas tried the case *de novo* on the record made in the Chancery Court, and in order to secure a reversal of this decree the burden was on the state to show in the Supreme Court that the evidence did not support the findings of the Chancery Court.

*England v. Scott, supra*;

*McCrite v. Hendrix College*, 198 Ark. 149.

The argument of the state had to be that the tax was not a direct tax, at most, an indirect and remote tax; but on the other hand the argument of the appellants to sustain the decree of the Chancery Court was that the tax was a direct tax and the statute constituted a direct interference with the United States in the sale of its property, the harvesting of its crop of timber, and the management of its forests.

The complaint that was filed in the Chancery Court stated that the timber in question was cut by the plaintiffs by contract executed by and between the United States and the plaintiffs under authority granted by acts of Congress authorizing sale of timber in the national forests, and that the state of Arkansas was seeking to interfere with privileges which had been granted to the plaintiffs by the United States; that the state's demand was in violation of the said act of Congress and that it was in violation of the supremacy clause of the Constitution and the clause that authorized Congress to dispose of its property (R. 4).

If the complaint was too indefinite, the court on motion of the defendants would have required the plaintiffs to make their complaint more definite and certain (Pope's Digest, section 165), but since no objection was made the court treated the complaint as having been amended to conform to the proof.

*Thomas v. Spires*, 180 Ark. 671;

*Bennett v. Snyder*, 147 Ark. 206;

*Simpson v. Blewitt*, 110 Ark. 87;

*Checker Cab Co. v. Leeper*, 207 Ark. 799.

The Supreme Court of Arkansas in its opinion stated that the appeal "presents the points herein discussed", and states the following points: "Does the immunity of a Federal government instrumentality inure to the benefit of the appellees?" In answering this question, the court started with this proposition: "It is fundamental that the Federal government and its instrumentalities are exempt from state taxation." (Citing *McCulloch v. Maryland*, 4 Wheat. 316, and other cases which involved a di-

rect tax or direct interference with the United States). The court also stated this proposition as one of the points presented: "Burden on government operations" (R. 10, 15, 16), and stated that the claim of tax immunity in the case at bar was the same as it had been in *James v. Dravo Contracting Company*, 302 US 134, *Mason Co., Inc., v. Tax Commission of Washington*, 302 US 186, and *Alabama v. King & Boozer*, 314 US 1 (R. 28); and in all of the cases referred to the principal point presented was whether the statute constituted a direct tax against the United States or a direct interference with its operations.

We, therefore, believe that question number 1 should be answered in the affirmative.

#### QUESTION II

"Does the record affirmatively show that the argument was made in the Supreme Court of Arkansas that the taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States?"

There is no direct statement anywhere in the record that such argument was made, but as before stated the Supreme Court of Arkansas said (R. 28) that the claim for tax immunity in *James v. Dravo Contracting Company, supra*, *Mason Company, Inc., v. Tax Commission of Washington, supra*, and *Alabama v. King & Boozer, supra*, "was the same as the claim made by the appellees in the case at bar".

In *James v. Dravo Contracting Company*, the second proposition laid down by this Court was "Is the tax invalid because it lays a direct burden on the Federal gov-

ernment?" And after stating this proposition, the Court said:

"The tax is not laid on the government, its property or officers. The tax is not laid on the government".

In *Mason Company, Inc. v. Tax Commission of Washington*, the Court merely stated that it was controlled by *James v. Dravo Contracting Company*, but the first proposition in the argument by counsel for appellant was that the tax was a direct burden on the government.

In *Alabama v. King & Boozer*, the second syllabus is:

"In this case, the legal incidence of the tax was on the contractor and not on the United States; the contractor, in buying the material, was not the agent or representative of the government; and the transaction was not such as to place the government in the role of purchaser". (Second Syllabus, page 9).

The record shows that the question before the Arkansas Supreme Court was whether the severance tax statute laid the tax on the government, and the Court could not have considered that proposition without considering the part of the statute which expressly required the severer to collect the tax from the United States as owner of the timber at the time it was severed, and could not have considered that question without deciding whether the statute was repugnant to the Constitution and laws of the United States because of that requirement.

#### QUESTION III

"Assuming that question (II), *supra*, is answered in the negative, does this Court have jurisdiction to consider

the argument that the taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States?"

The opinion of the Supreme Court of Arkansas referred to the fact that the statute required the tax to remain a lien on each unit of production (section 13,372 Pope's Digest); that the severed product should not be removed until the tax had been paid (Id. sec. 13,386); and that the statute required the reporting taxpayer to withhold the tax from the proceeds of the severed product (R. 10). The opinion shows that the Court considered the question of whether the severance tax act brought such a burden on the United States or its operations as would invalidate the act. We do not see how the Court could have decided that there was no such burden and how the Court could have considered the sections of the statute referred to without having considered the question of whether the statute was repugnant to the Constitution and laws of the United States because it required the severer to collect the tax from the United States as the owner of the timber at the time of severance.

*Dewey v. Des Moines*, 173 US 193, 198.

In *Dewey v. Des Moines*, *supra*, the appellant in the trial court raised only the question that a personal judgment against him was in violation of the 14th amendment. In this Court, he insisted that he should be permitted to argue the proposition that the assessment against his property was laid without regard to any question of benefits and that it exceeded the actual value of the property and constituted the taking of private property for public use without sufficient compensation, and that it was void.

as taking property without due process of law. This Court held that these two propositions were not necessarily connected, and said:

"If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form another ground or reason for alleging the invalidity of the personal judgment, we would have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued."

The Court held in effect that where the record shows that the Federal question must have been directly involved so that the state court could not have given judgment without deciding it, that the question sufficiently appears. In the instant case, the record affirmatively shows that the state court considered the question of burden on government operations (R. 28) and decided that there was no such burden as would show the act to be invalid. The idea that a state tax is unconstitutional merely because the economic burden of the tax may be passed on to the government has been so completely discarded (*James v. Dravo Contracting Company, supra*, *Alabama v. King & Boozer, supra*) that no lawyer would argue that such an indirect tax would be repugnant to the Constitution of the United States. The argument in the instant case before the Supreme Court of Arkansas was necessarily centered on the proposition that the statute constituted a direct interference with the United States, interference as distinguished from an indirect and remote

We do not see how the Court could have considered the question of the direct burden placed on the government by the taxing statute without fully considering that part of the statute which required the severer to collect

the tax from the government as the owner of the timber at time of severance.

QUESTION IV

"Do the assignments of error in this Court raise the question whether taxing statute is repugnant to the Constitution and laws of the United States because it requires the severer to collect the tax from the United States?"

The assignment of errors raises the point that the statute laid a tax for the privilege of severing the timber while the title was in the United States and that the persons who had the contract with the United States requiring them to sever the timber had to secure from the state of Arkansas a permit before commencing the execution of the contract (R. 35). This assignment indicates a direct interference with the government in the disposal of its timber and in clearing its land of "mature, dead and diseased trees." It seems to us that the fact that the statute required the severer to collect the tax from the United States is an enlargement of the proposition set out in the assignment.

*Dowey v. Des Moines, supra.*

However, as we concur in the opinion in *Flournoy v. Wiener*, 231 US 253, 259, the Court will also examine the points designated under rule 13 in determining what may be considered. If this is done, there appears to be no doubt that the question that the severer was required to collect the tax from the United States as the owner of the timber at the time of severance may properly be considered.

*Outline of Severance Tax Statute*

The Supreme Court of Arkansas did not construe the statute except to say that "it is a privilege or license tax levied on the privilege of severing" (R. 15). But it is not an occupation tax that is measured by the total amount of severing done by the taxpayer in a given period. It is a tax for the privilege of severing each tree. The severer is required to apply for a license on forms furnished by the state. He is required to agree that the tax "shall constitute and remain a lien on each unit of production"; and he is required to agree in advance that he will pay the tax (section 13,372 Pope's Digest). The state is given a lien for the tax on any and all natural resources severed (Id. sec. 13,376). The tract of land on which the product is severed is also made subject to the lien (Id. sec. 13,374). The tax and the lien therefore apply to every product severed except forest products severed by the owner for his own personal use and not for commercial gain or profit (Id. sec. 13,374).

The severer is required to make settlement with the state each month. He is required to pay the tax to the state and to collect it from the person who was the owner of the product at the time of severance (Id. sections 13,372 and 13,382). ~~The tax applies as well to one who clears the timber from one acre of land as well as to the person who engages regularly in the business of severing timber.~~

It is provided that the purchaser of any natural resource shall not permit its form to be changed until the tax is paid, provided that the purchaser may himself pay the tax (Id. sec. 13,386 D, 13,386 E). A complete copy of

the severance tax statute is set out in the appendix of this brief.

### *Acts of Congress That Are Involved*

The national forests were established "to furnish a continuous supply of timber for the use and necessities of the citizens of the United States" (Act March 3, 1891, with amendments, and Act of June 4, 1897, USCA Title 16, sections 471, 475).

Sale of dead, matured, or large trees was authorized "for the purpose of preserving the living and growing timber and promoting the younger growth" (Act June 4, 1897, and amendments, USCA Title 16, section 476). This statute as first enacted required this timber to be used in the state where produced, but section 491 authorizes the Secretary of Agriculture to permit export of such timber from the state where cut.

• Acts of Congress set out the different uses which shall be made of the forests and how the money derived from sale of timber shall be used. These include: Revenue for schools and roads (USCA Title 16, section 500); providing tree seeds, cones, nursery stock, etc. (Id. section 504); to promote and protect navigation (Id. section 520); water plants, dams, and reservoirs, etc. (Id. section 522, 524); for protection of municipal waterworks (Id. section 552 A); to aid in enforcement of the laws of the states with regard to stock, prevention and extinguishment of forest fires and protection of fish and game (Id. section 553); to cooperate with the states in procuring forest seeds, trees, and plants (Id. section 567); cooperation with the states in acquisition and administration of state forests (Id. section 567 A). USCA Title 16, section 576 B, au-

thorizes the Secretary of Agriculture to require the purchaser of timber to make deposits in addition to the payments for the timber to cover cost to the United States (1) planting (including production or purchase of young trees) (2) sowing with tree seeds (3) cutting, destroying, or otherwise removing undesirable trees \* \* \* in order to improve the future stand of timber.

*The Severance Tax Act Constitutes Direct Interference  
with the United States*

No state may be permitted to interfere with or embarrass the United States in the disposal or management of its property.

Constitution of the United States, Article 4, see, 3.  
Clause 2;

*U. S. v. Allegheny County*, 322 US 174;

*City of Springfield v. U. S.* (CCA) Mass. 99 F. (2d) 860, cert. den. 306 US 650.

By the terms of the contract between the United States and appellants, the title to the timber was in the United States at the time it was severed. The act requires the severer to collect the tax from the owner of "such natural resource at the time of the severance" (Pope's Digest, section 13,382). Failure to comply with such requirements is declared to be a misdemeanor (Id. last clause). A lien is given to the state on the land from which the product is severed (Id. section 13,374 last clause), and a lien is given on the severed product (Id. section 13,376). In order to enable the state to enforce its lien on the land, the severer's monthly reports must show the "place where severed or produced" (section 13,373, second clause).

The act not only places a direct tax on the United States, but it contains many regulatory provisions which would directly hamper the United States in the management of its forests and disposal of its property, the requirements for securing a license before any trees may be cut, monthly reports of severings, forbidding transportation of the logs (section 13,386 E), requiring reports by those who purchase the severed product and forbidding any change in the form of severed product (section 13,386).

*The Act Violates the Supremacy Clause of the  
Constitution*

All of the activities of the Federal Government must be free from taxation or regulation by a state.

Constitution of the United States, Article 6, Clause 2;

*McCulloch v. Maryland*, 4 Wheat, 316;

*Osborn v. Bank of U. S.*, 9 Wheat, 738;

*C. O. & G. R. Co. v. Harrison*, 235 US 292;

*Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 US 522;

*Howard v. Gypsy Oil Co.*, 247 US 503;

*Large Oil Co. v. Howard*, 248 US 549;

*Oklahoma v. Barnsdall Refineries*, 296 US 521;

*Mayo v. U. S.*, 319 US 441;

*Johnson v. State of Maryland*, 254 US 51;

*Ohio v. Thomas*, 173 US 276;

*Hunt v. U. S.*, 278 US 96;

*Arizona v. California*, 283 US 423.

No matter how urgent the need may be for removing the matured, dead, and diseased trees to promote the growth of the younger trees, the State of Arkansas, by its severance tax statute, would stop any person having a contract with the United States before he had laid an ax to a tree, would fine him, and, as a means of enforcing payment of the fine, confine him to jail. The right of the United States to be free from such interference has rarely been questioned. In this Court, there has never been any division of opinion on the question. In every case which has involved any such direct interference with the government's contract, the opinions of this Court have been without dissent.

The Supreme Court of Arkansas held that the instant case was controlled by *James v. Dravo Contracting Company, supra*, an income tax case, and *Alabama v. King & Boozer, supra*, a sales tax case; but we do not believe that the sales tax cases and income tax cases are applicable at all. This Court held that a tax on income earned under a government contract and a tax on purchase of materials used by the contractor in execution of his contract were in the same category as a tax on the contractor's property that was used in performance of his contract; that if it put any burden at all on the government, it was an indirect and remote burden caused by the fact that the final cost to the government might be increased by adding the tax or a part of it to the price the government would have to pay. But the question of cost to the government does not enter into the cases which we have cited, which we believe control the case at bar. In these cases, it is merely a question of an entire lack of power to place anything in the way of the government's contract or the execution of it or to offer any direct interference with the government in its activities.

The Supreme Court of Arkansas, after referring to *C. O. & G. R. Co. v. Harrison, supra*, and *Oklahoma v. Barusdall Refineries, supra*, said:

"We distinguish these cases in two ways (1) they were decided prior to *James v. Dravo*; (2) in these cases, the minerals were held by the United States as trustee for the Indian tribes."

It is true that the minerals were held by the government as trustee for the Indian tribes; but the national forests are held by the government as trustee of the people of the United States to provide them with a continuous supply of timber. Its obligation to the Indians is no greater than its obligation to the citizens of the United States.

If the Supreme Court of Arkansas had observed that the Indian land cases were decided by unanimous opinions, this might have caused the court to doubt that those cases were in the same class as *James v. Dravo Contracting Company*. Wherever a case has been decided on the principle that an indirect burden would render the tax invalid, the Court has been divided.

*Panhandle Oil Co. v. Mississippi*, 277 US 218;

*Indian Motorcycle Co. v. U. S.*, 283 US 570;

*Grates v. Texas Co.*, 298 US 393;

*Gillespie v. Oklahoma*, 257 US 501.

Until the views of the minority were accepted by the Court,

*Trinity Farm Construction Co. v. Grosjean*, 291 US 472;

*James v. Dravo Contracting Company, supra;*

*Helvering v. Gerhardt, 304 US 405, 416;*

*Alabama v. King & Boozer, supra.*

The principles which controlled *James v. Dravo Contracting Company* had already been decided in *Metcalf v. Mitchell*, 269 US 51, which was referred to as a pivotal case in *James v. Dravo*. But *Metcalf v. Mitchell* was not even mentioned in *Oklahoma v. Barnsdall Refineries, supra*, which was decided at a later date. We believe that the distinctions made by the Arkansas Supreme Court are wholly untenable. We can find no case which overrules or modifies the principle that "a tax on the leases is a tax on the power to make them and could be used to destroy the power to make them".

*Indian Territory Illuminating Oil Co. v. Oklahoma, supra.*

Since the Arkansas severance tax statute places a tax on the ~~United~~ States and would regulate and control the government in the management of its forests and disposal of its property, the statute is unconstitutional.

We, therefore, believe that the judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted

Wm. J. Kirby

SCOTT WOOD

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## APPENDIX

### THE ARKANSAS SEVERANCE TAX

(Pope's Digest, Sections 13,371-13,386, inclusive)

"See. 13371. *Tax levied.* There is hereby levied a privilege or license tax, to be known as "the Severance Tax", for the year 1923 and for each subsequent year, upon each person, firm, corporation, or association of persons, hereinafter called "the producer", engaged in the business of mining, cutting or otherwise severing from the soil or water for commercial purposes natural resources, including minerals and ores, pearls, diamonds, and other precious stones, bauxite, fuller's earth, phosphates, shells, chalk, cement, clay, sand, gravel, asphalt, ochre, oil, gas, salt, sulphur, lignite, coal, marble, stones and stone products, timber, turpentine, and all other forest products and all other natural products of the soil or water of Arkansas. Section 1, Act 118 of 1923.

"See. 13372. *Permit to sever resources.* Any person, firm, corporation or association desiring to engage in the business of severing natural resources as contemplated by this Act, shall before entering upon such business, make application for license or permit therefor to the Commissioner of Revenues.

"Such application shall, on forms to be prescribed by the Commissioner, state under oath the name of the applicant, the business in which applicant desires to engage, and the counties in which the operations are to be carried on, and the amount and value of the anticipated produc-

tion of the ensuing month based on applicant's operation for the preceding month. In such form the applicant shall expressly agree to abide by the provisions of this Act and promptly to pay the severance tax hereby imposed upon its subsequent ascertainment based upon the Producer's Report as hereinafter required.

"The applicant shall expressly obligate himself to pay at the end of the ensuing monthly period, as hereinafter prescribed, the amount of such estimated tax, more or less according to the actual production, and shall consent that such severance tax shall constitute and remain a lien on each unit of production until paid into the State Treasury as hereinafter provided.

"Upon the filing of such application, the Commissioner shall estimate the amount of the tax which shall accrue as based upon said anticipated production and shall issue a permit, wherein shall be stipulated such estimated amount.

"Whoever shall engage in the business of severing natural resources, without having made application for and secured a license or permit, as contemplated by this Act, shall be guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five (\$25.00) dollars nor more than One Hundred (\$100.00) Dollars. 1b, Sec. 2, as amended by Act 283 of 1929, Sec. 1, March 29, 1929.

"See, 13373. *Producers to report to Commissioner of Revenues.* Every producer shall, within ten days after the end of each month, file with the Commissioner of Revenues, a verified report of the business conducted by such producer during the past preceding month.

"Said Producer's Report shall be made upon forms prescribed by the Commissioner of Revenues, and shall truly set forth the kind of natural resources and place where severed or produced, the gross quantity and actual cash value thereof, and such other reasonable and necessary information as the Commissioner may require for the proper enforcement of the provisions of this Act.

"The report required by this Section shall be signed and sworn to by the individual producer or by a member of the producing firm, if a partnership, or by the president, secretary or managing producer, if a corporation. A willful, false swearing as to the contents of said report shall constitute the crime of perjury and shall be punished as such.

"The report herein prescribed shall be prepared and executed in triplicate, one copy of which shall be by the producer filed with the County Clerk in the county wherein the producer is doing business. Said report so filed shall be preserved as a public record.

"The failure of any person, firm, corporation or association to make the statements required by this Section shall be punished by fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00) for each offense. Ib. Sec. 3 as amended by Act 283 of 1929, Sec. 2.

"See. 13374. *Privilege Tax.* Except as to the production of certain natural resources, the privilege tax upon which is hereinafter specially provided for, each producer at the time of rendering such monthly report, shall concurrently file a duplicate thereof with and pay to the State Treasurer, through the Commission of Rev-

enues, a privilege tax amounting to two and one-half (2½) percent of the gross cash market value of the total production of such natural resources during the preceding monthly period.

"The value of such products shall be computed as of the time when and at the place where the same have been severed or taken from the soil or water, and in their unmanufactured state immediately after such severance. Provided, this Act shall not apply to nor shall any severance tax be required of the individual owner of timber who occasionally severs or cuts from his own premises such stocks, logs, poles or other forest products as are utilized by him in the construction or repair of his own structures or improvements, the purpose of this clause being to exempt therefrom such severers as utilize forest products to their own personal use and not for sale, commercial gain or profit.

"Every person, firm, corporation or association, severing any natural resources under the provisions of this Section, shall be liable to the State for the severance tax imposed herein, and in addition thereto the tract of land from which product was severed shall be subject to the lien hereinafter created. Ib. Sec. 4, as amended by Act 283 of 1929. See, 3.

"(*Floyd v. Miller Lumber Company*, 160 Ark. 17, 245 S. W. 450. The tax levied by this act on those engaged in the business of severing timber from the soil is a privilege tax on the occupation, and not a property tax, and is unconstitutional.)

"Sec. 13375. *Tax on bauxite; coal; timber.* (a) On Bauxite. Every producer of bauxite shall be subject to

all of the provisions of this act, except that instead of a tax of two and one-half ( $2\frac{1}{2}\%$ ) percent of the gross market value of said product, the producer of bauxite shall pay a privilege tax equivalent to twenty-five cents (25c) per ton on the total production of bauxite during the preceding quarterly period, irrespective of the market value thereof.

"(b) On Coal. Every producer of coal, shall be subject to all of the provisions of this act, except that instead of a tax of two and one-half ( $2\frac{1}{2}\%$ ) percent of the gross market value of said products, the producer of coal shall pay a privilege tax equivalent to one cent (1c) per ton on the total production of coal during the preceding quarterly period, irrespective of the market value thereof.

"(c) On Timber. Every producer of timber shall be subject to all the provisions of this Act, except that instead of a tax of two and one-half ( $2\frac{1}{2}\%$ ) percent of the gross market value of said products, the producer of timber shall pay a privilege tax equivalent to seven cents (7c) per thousand feet board measure on the total stumpage severed or cut during the preceding month, irrespective of the market value thereof. Provided that no tax herein levied shall apply to the producer of switch ties who hews out or makes such ties entirely by hand. (b) See, 5 as amended by Act 116 of 1933. See, 1.

"See, 13376. *Lien on resources for tax.* The State of Arkansas shall have a lien upon any and all natural resources severed from the soil or water for the tax and penalties herein imposed and, in addition thereto, said lien shall attach to the well, machinery, tools and implements used in severing of such resources. Act. 118 of 1923, Sec. 6 as amended by Act 283 of 1929. See, 4.

*"Sec. 13377. Tax on Timber paid into State Treasury—Credit of State Forestry Fund.* After the passage of this Act all severance tax collected on timber under existing provisions of law shall, upon payment into the State Treasury, be credited to the "State Forestry Fund" to be used by the State Forestry Commission for the development of forests of the State. Act 158 of 1937, approved March 1, 1937. See. 1.

*"Sec. 13378. Transporters required to furnish information.* When requested by the Commissioner of Revenues, or his duly authorized agent, all transporters of natural resources, as is subject to a Severance Tax, as contemplated by Act 118 of the Acts of 1923, as amended, out of, within, or across the State of Arkansas, shall be required to furnish said Commissioner of Revenues, under oath and upon forms prescribed by him, any and all information relative to the transportation of such natural resources, and such reports shall contain, in addition to other required information, the name of the shipper, date of shipment, quantity and type or character of such natural resource, stated in units of measurement applicable to such natural resources, the point of receipt or shipment and point of destination. Provided that no provision of this act shall be construed as applying to pipe line transportation. Act 333 of 1937, approved March 25, 1937.

*"Sec. 13379. Penalty.* The failure of any person, firm, corporation or association to make such transporter's report, required by Section 13378, shall be punished by fine of not less than Fifty (\$50.00) Dollars and not more than Five Hundred (\$500.00) Dollars for each offense. Id. Sec. 2.

"See, 13380. *False oath is perjury.* Any person who shall intentionally make any false oath to any report required by the provisions of this Act shall be deemed guilty of perjury and shall be subject to all penalties prescribed for said crime. Id. Sec. 3.

"See, 13381. *Procedure against delinquencies.* After the date fixed for the filing of each monthly report, and from and after such due date a penalty of twenty-five percent (25%) shall be added to the amount of such tax. If any producer shall fail within the time herein prescribed to make the sworn report of the quantity and value of the natural products so severed during the preceding monthly period, it shall be the duty of the Commissioner to examine the books, records and files of any such producer to ascertain the amount and value of such production during the preceding month and to assess the severance tax based thereon according to the procedure hereinafter in Section 13384, and to add thereto the cost of such examination, together with a penalty of twenty-five (25%) percent on the amount of said tax, and to certify the amount of such tax, cost and penalty to the State Treasurer for collection; provided, an appeal may be taken by any aggrieved producer to the Chancery Court having jurisdiction. Id. Sec. 7 as amended by Act 283 of 1929. See, 5.

"Section 13382. *Who liable for tax.* Except as otherwise in this Section provided, the making of said reports and the payment of said privilege taxes shall be required of the severer or producer actually engaged in the operation of severing natural products whether as owner, lessee, concessionaire or contractor.

"The reporting taxpayer shall collect or withhold out of the proceeds of the sale of the products severed the proportionate parts of the total tax due by the respective owners of such natural resources at the time of severance.

"And in the case of oil and gas, such production as shall be sold or delivered to any pipe line company and transported by it through pipes connected with the oil or gas well of the owner shall notwithstanding such sale or delivery be liable for the tax herein levied.

"Every producer actually operating any oil or gas well, quarry or other property from which natural resources are severed, under contract or agreement requiring payment direct to the owner of any royalty, excess royalty, or working interest, either in money or in kind, is hereby authorized, empowered and required to deduct from any such royalty or other interest the amount of the severance tax herein levied before making such payment.

"Any person, firm, corporation or association failing or refusing to comply with any of the provisions of this Section shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than Fifty Dollars (\$50.00) nor more than Five Hundred Dollars (\$500.00) for each offense. Ib. Sec. 8, as amended by Act 283 of 1929. Sec. 6.

"(*McFarlane v. Giller*, 174 Ark. 94, 294 S. W. 3. The lessor of oil and gas lands is not liable for such tax.)

"Sec. 13383. *Additional Data. Books and Papers.* The Commission shall have the power to require any producer to furnish such additional information as may be

deemed necessary for the fair determination of the amount of said privilege tax; and for said purpose it may examine the books, records and files of such producer; and to that end the Commission shall have power to issue subpoenas and examine witnesses.

"If, at the request of the Commission, any such witness shall wilfully fail to appear, or refuse access to such books and papers, the Commission shall certify the facts and the name of the recusant witness to the Circuit Court of the county having jurisdiction of the producer. The said court shall thereupon issue a subpoena commanding the said witness to appear before the Commission, at a place designated, on a day fixed, to be continued as occasion may require, and to give such evidence, and to open for inspection such books and papers as may be required for the purpose of ascertaining whether or not any report so made is true and correct.

"Whenever it shall appear to the Commission that any producer has unlawfully made an untrue or incorrect report, the Commission shall correct such report and shall assess said privilege tax thereon, and shall certify the same to the State Treasurer for collection. Ib. Sec. 9.

"See, 13384. *Enforcement of collection.* When any privilege tax levied hereunder shall become delinquent, the Commissioner shall certify the amount of such tax together with the penalties thereon to the Circuit Clerk of the county wherein the same or any part thereof accrued. And it shall be the duty of said clerk to file such certificate of record and to enter the same upon the docket of the Circuit Court for judgments and decrees under the procedure prescribed for filing transcripts of judgments

by Sections 8440 and 8442. Execution shall thereupon be issuable forthwith by the clerk of the Circuit Court directed to the sheriff, who shall make a levy thereon upon any property, assets and effects of the producer against whom the privilege tax is assessed.

"The sheriff, making such levy, shall be responsible on his official bond therefor, and within ten (10) days after collection shall pay over such tax, cost and penalty to the State Treasurer, taking proper receipt therefor.

"The clerk and sheriff shall receive the same fees for service required under this section as are now provided by law for similar services.

"If it shall become necessary in the administration of this section to file suit for the collection of any delinquent tax, such suit may be brought by the Commissioner of Revenues, in the county to which said tax has been certified. The Commissioner of Revenues is authorized to employ an attorney to prosecute such suit or to prosecute or defend any suit brought under the provisions of Section 13381, and he shall be authorized to pay out of any sum collected such amount as attorney's fee as the court trying the case may fix. Ib. Sec. 10, as amended by Act 283 of 1929. Sec. 7.

Sec. 13385. *Property tax unaffected.* The payment of the severance tax hereby imposed is in addition to the general property tax, and payment of the severance tax shall not affect the liability of the producers for all State, county, municipal, district and special taxes upon their real estate and other corporeal property; but no other tax in addition hereof shall be imposed upon the

rights to produce in this State those resources whose production is made the basis of the severance tax. *Ib.* Sec. 11.

"See. 13386. *Purchaser's sworn statements.* (a) It is hereby made the duty of all purchasers, consignors and other dealers of whatever nature in any natural product severed from the soil or water of Arkansas to file monthly with the Commissioner of Revenues a verified statement, showing the names and addresses of all persons, firms, corporations, associations or syndicates from whom such purchaser, or dealer, has acquired any such natural product during the preceding month, together with the total quantity of and gross value paid for each such purchase or consignment.

"(b) Such statement, made upon forms prescribed by the Commissioner, shall be filed within ten days after the expiration of each month, and shall be sworn to by the purchasing agent of the dealer or consignee, or by the officials or agents of such purchasers, corresponding with those required in Section 3 herein to verify the producer's reports.

"(c) The failure of any person, firm, corporation or association to make the statements required by this Section shall be punished by a fine of not less than Fifty Dollars (\$50.00) nor more than Five Hundred Dollars (\$500.00) for each such offense.

"(d) The purchaser of any severed natural resource as defined or contemplated in this act, or agent for such purchaser, whether he be a resident or nonresident person, corporation, partnership, fiduciary, or otherwise, shall not permit the manufacture or changing from its

natural state at the time of severance any natural resource so severed, until and after the tax as provided by law on same has been paid. There is hereby imposed on said purchaser the duty of first ascertaining whether or not the tax prescribed by law is paid on such severed natural resources before changing in any manner from its natural state at the time of severance, or for moving it to a destination with the intention of changing its natural state without the tax on same being first paid.

"(e) Provided, that in cases where the producer or severer has not paid the tax, the said purchaser, manufacturer, his agent, or otherwise, shall do so before manufacturing or changing in any way said resource from its natural state. Provided that in cases where it is impracticable for the purchaser to pay the tax before changing the severed resource from its natural state, the said purchaser shall pay said tax on or before the 10th day of the month subsequent to the changing of the severed resource from its natural state. Until and after the tax hereinbefore provided shall have been paid by the said purchaser, if not already paid by said producer or severer, such severed resources shall not under any circumstances be removed from the State, or be removed from point of severance to any place of assembly or place of concentration within the State, except as is convenient, practicable and consistent for such purchaser in the conduct of his business. That if before payment by either the producer or purchaser said severed natural product is manufactured or its original state changed, or if such natural product is removed from point of severance to a point of assembly or concentration with intent to withhold the whereabouts of said product, as provided in sub-section (P) herein, then the liability for said unpaid tax as pro-

vided herein shall be primarily binding upon said purchaser, and each separate case or instance of removal, manufacture, or otherwise changing the state of the product shall be construed to be a separate offense and the penalty and fine provided in sub-section (h) of this section shall be individually assessed in each case or instance against such purchaser or producer violating the provisions of this act.

“(f) That removal of such severed resources from the State by any means, or to any point of concentration or assembly not in line with or consistent with the conduct or operation of the general business of the purchaser or producer, shall be deemed an attempt to withhold the whereabouts of such severed products and be in wilful violation of the provisions of this act; and such act or removal shall be deemed and construed to be an intention to change the natural state of such natural resource upon which tax has not been paid; and such act or acts of removal shall be punished by a fine as hereinafter provided.

“(g) Each individual or single case or instance of removing said severed resources without tax being paid, as provided in this section, or each and every case or instance where such severed resource is by manufacture, grinding, sawing, crushing, screening or by whatever process or procedure of whatever nature changed from its natural state, without the tax being paid, shall constitute a separate and distinct offense and each separate offense shall be punished by fine and penalty as provided in this section.

“(h) That violation of the provisions of this section shall subject the purchaser to a fine of not less than Fifty

(\$50.00) Dollars and not more than Five Hundred (\$500.00) Dollars for each offense. In all cases where producer or purchaser is assessable for the tax, as provided in subsection (e) herein and demand is made upon him by the Commissioner of Revenues, or his duly authorized agents, for said tax and same is not paid within fifteen (15) days after receipt of said demand, a penalty of  $25\%$  of the said tax due is hereby levied and assessed.

“(i) If any purchaser, producer, or his agent shall fail to pay the privilege or excise tax, the Commissioner of Revenues is empowered and directed to compute said tax on the basis of such information as may be available and certify the same to the Clerk of the Circuit Court of any County in this State in which said purchaser or producer is operating or doing business, and it shall be the duty of the clerk to file such certificate of record and enter the same upon the docket of the Circuit Court for judgments and decrees under the procedure for filing transcripts of judgments by Sections 8440 and 8442. Execution shall thereupon be issued by the clerk of the Circuit Court, directed to the sheriff who shall make levy on any property, assets or effects of such purchaser or his agent against whom the tax is assessed. The Sheriff making such levy shall be responsible to the state on his official bond therefor and shall pay over such tax and penalty thereto if collected, to the State Treasurer, through the Commissioner of Revenues. The Clerk and Sheriff shall receive the same fees for services under this section as are now provided by law for similar services. Provided, that any aggrieved purchaser or his agent may appeal to the Chancery Court having proper jurisdiction, for an injunction against such tax. This sub-paragraph shall be construed to be separate and distinct from other sub-

paragraphs in this section providing for fines and penalties and is supplemental thereto.

"(j) No bond for costs shall be required in any court of this State for prosecution in criminal actions, nor in civil actions, for violations of the provisions of this Act and in all causes at law or in equity the State of Arkansas shall have the same right of appeal as any individual person.

"(k) The Commissioner of Revenues shall have the power to make such rules and regulations as he deems requisite and advisable for the administration of this Act, relating to the manner, ways and means of enforcing the provisions of same. \* \* \* \*

"Ib. Section 12 as amended by Act 283 of 1929, as amended by Act 138 of 1933, sec. 1, approved March 24, 1933. \* \* \* \*

"Ib. Section 14, as amended by Act 775 of 1923, approved March 28, 1923."